# No. 15,009

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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In the Matter of the Application
for Citizenship of
ALEJO TRABOCO TANO, et al.,
*Appellants,*

vs.

UNITED STATES IMMIGRATION AND
NATURALIZATION DEPARTMENT,
*Appellee.*

**On Appeal from the United States District Court for the Northern District of California.**

## REPLY BRIEF OF THE UNITED STATES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Authorities Cited

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### STATEMENT OF FACTS.

All of the appellants herein are natives of the Philippine Islands. None were ever admitted to the United States for permanent residence. All were employed by the United States on United States vessels through the Army Transport Service or its successor, the Military Sea Transport Service. On September 23, 1950 appellants Polintan, Magallanes, Martinez and Abella *had not* completed five years sea service, and appellants Tano, Elizalde and Romano *had* com-

pleted five years sea service. None of the appellants filed a petition for naturalization prior to September 23, *1955*.

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**STATUTES.**

Section 325 of the Nationality Act of 1940, 8 U.S.C. 725 (1942 edition), 54 Stat. 1150, as originally enacted, read as follows:

> Sec. 325 (a) A person who has served honorably or with good conduct for an aggregate period of at least five years (1) on board of any vessel of the United States Government other than in the United States Navy, Marine Corps, or Coast Guard, or (2) on board vessels of more than twenty tons burden, whether or not documented under the laws of the United States, and whether public or private, which are not foreign vessels, and whose home port is in the United States, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service on a reenlistment, reappointment, or reshipment, or within six months after an honorable discharge or separation therefrom.
>
> (b) The provisions of subsections (b), (c), (d), and (e) of section 324 shall apply to petitions for naturalization filed under this section, except that service with good conduct on vessels

described in subsection (a)(2) of this section may be proved by certificates from the masters of such vessels.

Section 325 of the Nationality Act as amended September 23, 1950, 8 U.S.C. 725 (1946 edition) 64 Stat. 1015 reads as follows:

Sec. 325 (a) Any periods of time during all of which an alien who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the armed forces of the United States (1) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States; or (2) on board a vessel whose home port is in the United States, and (A) which is registered under the laws of the United States, or (B) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of any of the several States of the United States, shall be deemed residence within the United States within the meaning of Section 307 (a) of this Act, if such service occurred within five years immediately preceding the date such alien shall file a petition for naturalization. Service with good conduct on vessels described in clause (1) of this subsection shall be proved by duly authenticated copies of the records of the executive departments or agency having custody of the records of such service. Service with good conduct on vessels described in clause (2) of this subsection may be proved by certificates from the masters of such vessels.

(b) Any alien who (1) was excepted from certain requirements of the naturalization laws under the provisions of this section prior to this amendment, and (2) has filed a petition for naturalization under this section prior to the date of approval of this amendment may, if such petition is pending on the date of approval of this section as amended, be naturalized upon compliance with the applicable provisions of the naturalization laws in effect upon the date such petition was filed.

Section 330 (a) (2) and (b) of the Immigration and Nationality Act of 1952, 66 Stat. 251, 8 U.S.C. 1441, reads as follows:

Section 330(a)(1). * * *

Section 330(a)(2). For the purposes of this subsection, any periods of time prior to September 23, 1950, during all of which any person had served honorably or with good conduct for an aggregate period of five years on any vessel described in Section 325(a) of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, shall be deemed residence and physical presence within the United States within the meaning of Section 316(a) of this title, if such petition is filed within one year from the effective date of this Act. Notwithstanding the provisions of Section 318, a person entitled to claim the exemptions contained in this paragraph shall not be required to establish a lawful admission for permanent residence.

* * * * * * *

(b) Any person who was excepted from certain requirements of the naturalization laws under sec-

tion 325 of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, and had filed a petition for naturalization under section 325 of the Nationality Act of 1940, may, if such petition was pending on September 23, 1950, and is still pending on the effective date of this Act, be naturalized upon compliance with the applicable provisions of the naturalization laws in effect upon the date such petition was filed: Provided, That any such person shall be subject to the provisions of section 313 and to those provisions of section 318 which relate to the prohibition against the naturalization of a person against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act, or which relate to the prohibition against the final hearing on a petition for naturalization if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act.

Section 405 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1101, Historical Note) 66 Stat. 280 reads as follows:

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document of proceeding which shall be valid at the time this Act shall take effect; or to affect any

prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(c) * * *

## QUESTIONS PRESENTED.

From the Specification of Errors appellants raise the following questions:

(1) Did each of appellants have a status, condition or right in process of acquisition at the time the Immigration and Nationality Act of 1952 went into effect December 24, 1952 which was preserved to them by Section 405(a) of the Act.

(2) May the performance of shoreside service in the case of appellants Polintan, Magallanes, Martinez and Abella be credited as sea service.

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## ARGUMENT.

### I.

### THE SAVINGS CLAUSE OF THE IMMIGRATION AND NATIONALITY ACT DOES NOT APPLY BECAUSE THE PETITIONERS HAD NO STATUS, CONDITION OR RIGHTS AT THE TIME THE ACT BECAME EFFECTIVE.

In the Nationality Act of 1940 Congress included Sec. 325(a) (8 U.S.C. 725(a), 1942 ed.) which permitted seamen to substitute five years service on American vessels for the five years residence in the United States required for naturalization under Sec. 307 (8 U.S.C. 707). Sec. 325 remained in effect until 1950 when it was amended by Sec. 26 of the Internal Security Act of 1950, Title 8 U.S.C. 725, 1946 ed., Supplement IV to provide that only seamen who had first *been admitted* to the United States *for permanent residence* could substitute sea service on Amer-

ican vessels for residence within the United States. This provision was retained in the Immigration and Nationality Act of 1952, Sec. 330(a)(1), Title 8 U.S.C. 1441(a)(1), but a special provision was added, Sec. 330(a)(2), permitting those seamen having an aggregate of five years of sea service before September 23, 1950 to use that time to satisfy the residence requirement for naturalization, *provided* "such petition is filed within one year from the effective date of this Act." (December 24, 1952.) Appellants failed to file their petitions within the period from December 24, 1952 to December 24, 1953. They seek to avoid the failure to satisfy the condition of the statute by invoking the Savings Clause, Sec. 405(a) of the 1952 Act.

Section 405(a) of the Immigration and Nationality Act of 1952, Title 8 U.S.C. §1101, 1953 ed., provides that "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect . . . any status . . . existing at the time this Act shall take effect."

This provision cannot be invoked by appellants because §330(a)(2) of the 1952 Act specifically provides otherwise and was meant by Congress to be exclusive. If the Savings Clause was meant to apply, there would have been no reason to insert the time limitation of one year. Congress certainly did not intend that those who were eligible under Section 330(a)(2), but who failed to file their petitions within the time allotted, could file them at any time under the Savings Clause.

Moreover, the Savings Clause "saves" only those rights existing at the time of its passage as stated above. Appellants had no rights or "status" which the Savings Clause could "save" at the time the Immigration and Nationality Act was passed in 1952. Congress in 1950 had imposed the additional requirement of lawful entry for permanent residence in the United States before sea service could be used as a substitute for the residence requirement. This change was not made without due consideration. In the Report of the Judiciary Committee, 82nd Congress, First Session (1951), page 705, it is stated:

> "The consensus is that this is one of the weak spots in our nationality law and one which is most subject to abuse and fraud . . . There is abundant evidence to support the statement that the liberal provisions of Section 325 (of the 1940 Act) encourage ship jumping and put a premium on illegal entry as a prerequisite for naturalization."

Appellants were not eligible for naturalization during the period from September 23, 1950 to December 24, 1952. By the enactment of Section 330 (a)(2) Congress extended to those persons who had completed five years of service on American vessels prior to September 23, 1950 the opportunity within one year after December 24, 1952 to file petitions for naturalization based on such service. Congress thereby restored them to eligibility for the period of one year. There is provision for no alternative to filing the petition within the year.

The language of the Savings Clause is very broad but it is apparent that the intention was to preserve those rights or privileges which had accrued and could have been pursued but for the enactment of the Immigration and Nationality Act. Neither *United States v. Menasche,* 348 U.S. 528 (1955) nor *Zacharias v. Shaughnessy,* 221 F.2d 578 (2d Cir. 1955) are applicable to support appellants' contention that the Savings Clause should apply, since in both cases the petitioners had an existing legal status at the time the 1952 Act was passed; in fact, in the *Menasche* case, the petitioner had filed a declaration of intention to become an American citizen, the validity of which is expressly preserved by Section 405(a). In each of these cases, but for the Act, the relief sought could have been granted; therefore the Savings Clause applied. In the instant cases, the appellants were not eligible for naturalization between September 23, 1950 and December 24, 1952, and did not lose any rights or privileges by reason of the enactment of the Immigration and Nationality Act of 1952.

The essence of appellants' contention here is not to preserve a right or privilege but to create one.

More pertinent to the instant case is *Shomberg v. United States,* 348 U.S. 540 (1955), decided by the Supreme Court at the same time as the *Menasche* case. The *Shomberg* case was concerned with Section 318 of the 1952 Act, 8 U.S.C. §1429, 1953 ed., which states that "no petition for naturalization shall be finally heard . . . if there is pending against the petitioner a deportation proceeding". The petitioner

contended that the Savings Clause Sec. 405 preserved his eligibility for citizenship under prior law. The Court held "That Sec. 318 specifically excepts rights under the prior law from the protection of Sec. 405 when these rights stem from a petition for naturalization or from some other step in the naturalization process."

The Court also said, page 546:

> "Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play."

Appellants' eligibility for naturalization under Sec. 325 of the Nationality Act of 1940 was terminated by the 1950 amendment. On appellants' contention there is no distinguishing reason why eligibility acquired under a still earlier statute, long since amended or repealed, should not also be considered as "preserved" by the Savings Clause of the 1952 Act. Under the law prior to 1941, for example, seamen had only to serve three years to satisfy their residence requirement. To contend that seamen who served three years prior to 1941 should be able to assert their status under the law at that time by applying the Savings Clause of the 1952 Act would be absurd.

Appellants' argument that the Nationality Act of 1940 was repealed in its entirety by the Immigration and Nationality Act of 1952 and therefore rights which had accrued under Sec. 325 of the Act as originally enacted were preserved overlooks the fact that Sec. 325 had been amended in 1950 to require

lawful entry for permanent residence as a condition to eligibility for naturalization. The 1952 Act continued the requirement of lawful entry for permanent residence, but added a waiver for one year only within which the petition could be filed.

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## II.

### THE FAILURE OF APPELLANTS TO FILE PETITIONS FOR NATURALIZATION BETWEEN DECEMBER 24, 1952 AND DECEMBER 24, 1953, PRECLUDES THEM FROM NATURALIZATION UNDER THE IMMIGRATION AND NATIONALITY ACT.

All of the appellants admittedly filed petitions for naturalization subsequent to December 24, 1953. The Court below has found as a fact that appellants failed to file a petition for naturalization within one year after December 24, 1952. Appellants contended below and contend here that something less than *filing* a petition will satisfy the express requirement of Sec. 330(a)(2), ". . . if such petition is filed within one year from the effective date of this Act." Appellants have cited no authority to support such a contention. The Court below has found it not to be true that appellants attempted to file a petition. This finding is abundantly supported by the record.

Rule 52(a) of the Federal Rules of Civil Procedure, Title 23 U.S.C., 1950 ed., provides that "In all actions tried upon the facts without a jury . . . findings of fact shall not be set aside unless clearly erroneous."

*United States v. Gypsum Co.*, 333 U.S. 395.

Regardless of the finding of the Court below as to the absence of "attempt" it is the position of appellee that the statute affords no alternative to the filing of the petition. The language of the statute is clear, the one essential act necessary to obtain the benefit of the waiver of the requirement of lawful entry for permanent residence and to substitute the five years sea service is to *file the petition* within the one year subsequent to the effective date of the 1952 Act, December 24, 1952.

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## III.

**THOSE PETITIONERS WHO DID NOT SERVE FOR FIVE YEARS ON VESSELS DID NOT MEET THE REQUIREMENTS OF SECTION 325 OF THE NATIONALITY ACT OF 1940 PRIOR TO ITS AMENDMENT ON SEPTEMBER 23, 1950 AND THEREFORE ARE NOT ELIGIBLE FOR NATURALIZATION.**

Assuming appellants Polintan, Magallanes, Martinez and Abella filed petitions for naturalization within the one year after December 24, 1952, they are not eligible for naturalization in that they do not have five years service on board any vessel within the meaning of Sec. 330(a)(2) of the 1952 Act.

Sec. 330(a)(2) requires service "honorably or with good conduct for an aggregate period of five years on any vessel described in Sec. 325(a) of the Nationality Act of 1940." Section 325 of the Nationality Act of 1940 as originally enacted, provided that "a person who has served honorably or with good conduct for an aggregate period of at least five years

(1) on board of any vessel . . . or (2) on board vessels . . .'' This language could hardly be clearer but it is made so by the incorporation of subsections (c) and (d), among others, of Sec. 324 (8 U.S.C. 724). Reading both sections together, as they were intended to be, a petitioner will prove five years of sea service by the certificate of the master of the vessels on which he served, or by other competent evidence. Assuming his service was not continuous, then he proves his residence, character and attachment to the Constitution during the periods between his service by the testimony of witnesses. To hold that a seaman was not required to serve five years on board vessels would not only do violence to the language of the section but would defeat its purpose, namely, to obtain qualified persons to man the ships. Employment on shore in the Philippine Islands as a clerk for the United States Maritime Commission or at Treasure Island, in the Officers' Mess, is not employment on board vessels.

The matter is discussed in the Joint Hearings before the Subcommittee on the Judiciary, Congress of the United States, 82nd Congress, First Session (1951) at page 544 et seq. See also Hearings Before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, First Session, at page 108 et seq. for a consideration of the section prior to its enactment as part of the Nationality Act of 1940.

## CONCLUSION.

In conclusion it may be said that the petitioners' eligibility for naturalization was restored when the Immigration and Nationality Act of 1952 went into effect and they were allowed the period of one year from December 24, 1952 within which to file petitions for naturalization. On December 25, 1953 their eligibility under Sec. 330(a)(2) of the Act had ceased. The decision of the Court below denying the petition should be affirmed.

Dated, San Francisco, California,
July 30, 1956.

Respectfully submitted,

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